Introduction to Property

> The word "property" is used […] to denote legal relations between persons with respect to one thing. The thing may be an object having a physical existence or it may be any kind of an intangible such as a patent right or a chose in action.
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> American Law Institute, Introductory Note,
> Restatement (First) of Property (1936)

1. What Do We Mean By "Property"?

1.1 What is Property?

In common parlance, the word "property" refers to things that you or I might own, such as a car or a book. In law, however, the term "property" is more accurately seen as a "relationship" between people and things. These "things" may be tangible, such as land, a dog, or a bunch of bananas; or, they may be intangible so as to include things like copyrights, software licenses, or shares in a corporation. In law, then, the term "property", more properly refers to "the network of legal relationships prevailing between individuals in respect of things." "Property" comprises bundles of mutual rights and obligations between "subjects" in respect of certain "objects", and the study of the law of property becomes an inquiry into a variety of socially defined relationships and morally conditioned obligations.

One central element of property rights is their relationship to third parties. Unlike personal rights, which may arise, for example, out of contractual relationships, and which, save in certain cases, have no impact upon third parties, property rights may both benefit and bind third parties who had no part in creating the right in question. A contract generally binds only the parties to it. A right in property, however, can, and indeed must, be respected by third parties. The contract for sale between, for example, Apple and Student for a Mac Book produces effects only between Student and Apple. Nonetheless, the ownership of the computer, which results from of the contract of sale, produces effects against the world (*erga omnes*).

This concept was aptly stated by Lord Wilberforce in *National Provincial Bank v. Ainsworth* [1965] AC 1175, 1247-1248:

> Before a right or an interest can be admitted into the category of property, or of a right affecting property, it must be definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability.

Of course, as with many things in law, there are exceptions; but, by and large, the principles set forth by Lord Wilberforce hold sway in the present day.

1.2 Property as Relationship

Some say that property is "a bundle of rights". That is to say, property is not a thing, but rather a collection of rights over tangible and intangible objects that are enforceable against others. To be sure, these rights are created by law, but the range of rights is as diverse as human activity itself. Among the most commonly recognized rights are (1) the right to possess and have exclusive physical control over an object or thing; (2) the right to use; (3) manage; (4) draw income; (5) transmit or destroy capital; (6) enjoy protection from expropriation; (7) dispose of the interest on death; (8) hold forever; and (9) have a residual or reversionary interest arising on the expiration of a prior interest. In addition, property is also (10) liable to seizure for debt and (11) subject to regulation against its harmful use.[1]

A closer look at the features of property relationships indicates that some part of an owner's relationship involve what we might consider "claims-rights", such as the right to manage or use property. Others appear to be in the nature of a privilege, such as the right to destroy property without interference from others.

The inclusion of items (10) and (11) are somewhat puzzling, since they involve the claims of others against property. The right to seize property for debt and the obligation to refrain from using property to harm others both reflect the fact that an owner of property also has obligations to others. Including these elements in a discussion of property rights indicates more clearly how the property relationship is one that exists not only between an owner and a "thing", but between an owner, the "thing", and others as well.

It is important to note that the list of rights discussed above is neither complete nor absolute. Property rights wax and wane depending on the nature of the thing, the complexity of the economic system, and moral and philosophical theory. Parliament and the courts may create or restrict rights. For example, new forms of family relationships, including civil partnerships or same-sex marriage, forces legal institutions to redefine or create new ways of looking at family property. At the same time, advances in technology often result in the creation of "new property" for which earlier understandings of property relationships are obsolete. Thus, the appearance of patents, software licenses, and now, "bitcoin", all create the possibility of new property relationships. One must then, first, determine whether they are, in fact, property, and second, whether the relationships arising between these things should fall within established patterns or whether new rights and obligations need to be developed.

1.3 Types of Property

Property can be divided into at least three general categories. These include "private property", "public property", and "common property".

1.3.1 Private property

Private property is that bundle of rights existing between a private-non-governmental entity, and a thing. This is, of course, the type of property we most often think about when we use the term. It includes the property of natural persons and corporations or other legal entities. Its most fundamental aspect is the right to exclude. By that, we mean that the single most salient feature of private property is the right to its exclusive use and the corresponding ability to exclude others from its possession.

1. A.M. Honore, "Ownership" in Oxford Essays in Jurisprudence 107 (A.G. Guest ed. 1961).

1.3.2 Public (crown) property

Public property is property in which the state possesses the the right to exclude. It is commonly thought to be that property subject to state control and burdened with public obligations.[2] In Canada, it is the property of the Crown, and might include things such as schools, libraries, provincial parks, naval vessels, or government research laboratories.

1.3.3 Common property

Common property is a term that is used to refer to property in which everyone has a right to use, but no one has a power to exclude. Traditionally, common property included the the sea and the air and anything that grew or lived in them. In the classical view, anyone had the right to take and use the fish of the sea or to sail upon its waters. No government nor any private individual had the right to exclude another from these resources.

The problem with common property, of course, is that its lack of ownership means that no one is ultimately responsible for its care and preservation. The result is the now-famous "tragedy of the commons":

> When things are left open to the public, it is said, they are wasted, either by over use or under investment. No one wishes to care for things that may be taken away tomorrow, and no one knows whom to approach to make exchanges. All resort to snatching up what is available for "capture" today, leaving behind a wasteland – thus the tragedy. From this perspective, "public property" is an oxymoron: things left open to the public are not property at all but rather its antithesis.[3]

Others contend that rights to common property are degraded by the action of government which ultimately takes what is common to all and converts it to private property. Wallace Clement makes this point by using the example of fishing licences allocated by the Canadian government to fishermen:

> As far as rights of access to fish, it has been transformed from common to private property for the most part. The state excludes some from the use or benefit of the products of the sea, not simply regulating its use […] The (fishing) licenses themselves, which are "tickets" to the amount of fish which may be gathered, the species, time and location, take one of the founding of their own. They become private property – the state grants the rights, individuals (or corporations) have the rights, and in the case of some fishing rights, these can be sold as private property.[4]

Another, arguably more relevant, example is the airwaves. Traditionally, the air and the things transported in or by it were considered common property. Now, however, we have government allocating radio frequencies and then selling them off to the highest bidder for radio, television, satellite transmission, and cell phones. The airwaves, which might have been thought to be common to all, have been privatised by government for the public good.

1.3.4 Corporeal and Incorporeal Property

A further subdivision of property is that between *corporeal* (tangible) and *incorporeal* (intangible) things. An automobile is corporeal property, while a share of stock in a corporation is incorporeal.

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2. Bruce Ziff, Principles of Property Law 5 (1993).
3. Garrett Hardin, The Tragedy of the Commona, 162 Science 1243 (1968).
4. Wallace Clement, Class, Power and Property: Essays on Canadian Society 215 (1983).

1.3.5 Fixtures

An important class of corporeal property includes what are known as "fixtures". In a strict sense, any object affixed or attached to a building or to land, and which becomes part of it, will be deemed a fixture. Yet, this defninition creates some difficulty. In *Elitestone Ltd v Morris* [1994] 1 WLR 687 (HL), Lord Lloyd noted that "[i]n ordinary language one thinks of a fixture as being something attached to a building. [However, one] would not ordinarily think of the building itself as a fixture."

Lord Lloyd went on to state that confusion could result from varying uses of the term, "fixture", which culd be sued to describe a tenant's fixtures, such trade and ornamental fixtures, which while they meet the strict legal defnition of fixture, could nevertheless be removed by a tenant during the course of, or at the end of, the tenancy. He went on to clarify the definition further:

> For my part I find it better in the present case to avoid the traditional two-fold distinction between chattels and fixtures, and to adopt the three-fold classification set out in *Woodfall, Landlord and Tenants*:
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> "An object which is brought onto land may be classified under one of three broad heads. It may be (a) a chattel; (b) a fixture; or (c) part and parcel of the land itself. Objects in categories (b) and (c) are treated as being part of the land."

[1994] 1 WLR 687 (citation omitted).

Two elements are of importance in determining whether an object should be treated as being part of the land. These include (1) the degree of annexation (i.e., by what physical means is the object affixed to the property, and (2) the purpose of the annexation (i.e., the object pursued in attaching the chattel to the land). This test was summarised by Blackburn J in *Holland v Hodgson*, LR 7 CP 328, 335:

> Thus blocks of stone placed one on the top of another without any mortar or cement for the purpose of forming a dry stone wall would become part of the land, though the same stones, if deposited in a builder's yard and for convenience sake stacked on the top of each other in the form of a wall, would remain chattels.

(i) Degree of Annexation. As a rule, a chattel is not deemed to become a fixture if it is not actually fastened or affixed in some way to the land or building.

(ii) Object of Annexation. The purpose of annexation is crucial to making a determination as to whether a chattel ought to be considered a fixture. In this regard, courts consider whether the object has been affixed in order to make it more convenient to use the property or whether the purpose was to improve it. If the former, then the object remains chattel and may be removed by the person who placed it on the land. If, however, the object was placed on the land or in the building to improve it, then the chattel may be deemed to be a fixture which could not, in principle, be removed.

Two examples illustrate the distinction: A butcher who leases a shop and who attaches display counters to the floor may remove the items at the end of the lease because the object of the attachment was to make it more convenient to sell the goods. On the other hand, a tenant who installs a furnace in a leased building will likely not have the right to remove it at the end of the tenancy because the purpose of the attachment was to improve the property.

As can be seen, therefore, whilst the test may be easily stated, its application in any given case will depend on the specific facts. Over time, courts have developed the categories of chattel or fixture in individual cases, but new cases and situations will continue to arise.

2. The Case for Private Property

> There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe. And yet there are very few that will give themselves the trouble to consider the original and foundation of this right. Pleased as we are with the possession, we seem afraid to look back to the means by which it was acquired, as if fearful of some defect in our title; or at best we rest satisfied with the decision of the laws in our favour, without examining the reason or authority upon which those laws have been built.
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> Sir William Blackstone, Commentaries on the Laws of England (1753), Bk II, c. 1*2.

If, as Blackstone says, the essence of private property is the right to exclude, one must grapple with the justification for the existence of private property. The question, therefore, is what is the rationale for allowing individuals to take common property and convert it to their private use? On one level, the tragedy of the commons provides some justification: if everything is held in common, no one has an incentive to care for it, with the result that it eventually withers away and is destroyed. Throughout the centuries, however, moral, legal, and political philosophers have advanced a number of theories for determining how property ought to be allocated by society.

2.1 Occupation

The first, and perhaps most primitive, justification for the existence of private property comes from the theory of occupation. Put simply, occupation involves taking possession of property that "belongs to no man". The most extensive discussion of this principle was presented by Sir Henry Sumner Maine, a leading statesman of the Victorian era. Maine was a professor at Trinity College (Cambridge) and became the nineteenth century's most prominent scholar of early legal systems.

■ ***Henry Sumner Maine, Ancient Law (1861)***
223-223

The Roman lawyers had laid down that Occupancy was one of the Natural modes of acquiring property, and they undoubtedly believed that, were mankind living under the institutions of Nature, Occupancy would be one of their practices. How far they persuaded themselves that such a condition of the race had ever existed, is a point, as I have already stated, which their language leaves in much uncertainty; but they certainly do seem to have made the conjecture, which has at all times possessed much plausibility, that the institution of property was not so old as the existence of mankind. Modern jurisprudence, accepting all their dogmas without reservation, went far beyond them in the eager curiosity with which it dwelt on the supposed state of Nature. Since then it had received the position that the earth and its fruits were once res nullius, and since its peculiar view of Nature led it to assume without hesitation that the human race had actually practised the Occupancy of res nullius long before the organisation of civil societies, the inference immediately suggested itself that Occupancy was the process by which the "no man's goods" of the primitive world became the private property of individuals in the world of history.

2.2 Donation or natural law

A great many early theorists of private property believe that private property was conferred on mankind by the creator. The most prominent advocate of this theory was Thomas Aquinas, one of the Church's greatest theologians and philosophers. Aquinas lived in Italy during the thirteenth century and produced a wide range of biblical commentaries and theological treatises. His crowning achievement, the Summa Theologica, contains the following passage wherein he describes the theory of Donation:

■ ***Thomas Aquinas, Summa Theologica (1278)***
Bk 2, pt 2, q 66, arts 1-2

External things can be considered in two ways. First, as regards their nature, and this is not subject to the power of man, but only to the power of God Whose mere will all things obey. Secondly, as regards their use, and in this way, man has a natural dominion over external things, because, by his reason and will, he is able to use them for his own profit, as they were made on his account: for the imperfect is always for the sake of the perfect, as stated above (Q[64], A[1]). It is by this argument that the Philosopher proves (Polit. i, 3) that the possession of external things is natural to man. Moreover, this natural dominion of man over other creatures, which is competent to man in respect of his reason wherein God's image resides, is shown forth in man's creation (Gn. 1:26) by the words: "Let us make man to our image and likeness: and let him have dominion over the fishes of the sea", etc.

Two things are competent to man in respect of exterior things. One is the power to procure and dispense them, and in this regard it is lawful for man to possess property. Moreover this is necessary to human life for three reasons. First because every man is more careful to procure what is for himself alone than that which is common to many or to all: since each one would shirk the labor and leave to another that which concerns the community, as happens where there is a great number of servants. Secondly, because human affairs are conducted in more orderly fashion if each man is charged with taking care of some particular thing himself, whereas there would be confusion if everyone had to look after any one thing indeterminately. Thirdly, because a more peaceful state is ensured to man if each one is contented with his own. Hence it is to be observed that quarrels arise more frequently where there is no division of the things possessed.

The second thing that is competent to man with regard to external things is their use. In this respect man ought to possess external things, not as his own, but as common, so that, to wit, he is ready to communicate them to others in their need. Hence the Apostle says (1 Tim. 6:17, 18): "Charge the rich of this world […] to give easily, to communicate to others", etc.

2.3 Labour

It is difficult, if not impossible, to fully grasp Anglo-American approaches to property without a thorough understanding of work of the seventeenth century English philosopher, John Locke. In his *Two Treatises on Government*, Locke attacked the theory of the divine right of kings and argued for the legitimacy of government founded on contract and the consent of the governed. He advocated a limited government based both on a theory of contract and the protection of property rights. Locke's philosophy had a tremendous impact on the intellectual leaders of the American Revolution. In the following excerpt from the *Two Treatises*, we encounter Locke's justification for private property.

■ *John Locke, Two Treatises of Government (1713)*
Bk 1, ch 5, §§ 27-28, 31-32, 34

§ 27. Though the earth, and all inferior creatures, be common to all men, yet every man has a property in his own person: this no body has any right to but himself. The labour of his body, and the work of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state nature hath placed it in, it hath by this labour something annexed to it, that excludes the common right of other men: for this labour being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, at least where there is enough, and as good, left in common for, others.

§. 28. He that is nourished by the acorns he picked up under an oak, or the apples he gathered from the trees in the wood, has certainly appropriated them to himself. Nobody can deny but the nourishment is his. I ask then, when did they begin to be his? when he digested? or when he eat? or when he boiled? or when he brought them home? or when he picked them up? and it is plain, if the first gathering made them not his, nothing else could. That labour put a distinction between them and common: that added something to them more than nature, the common mother of all, had done; and so they became his private right. And will any one say, he had no right, to those acorns or apples, he thus appropriated, because he had not the consent of all mankind to make them his? Was it a robbery thus to assume to himself, what belonged to all in common? If such a consent as that was necessary, man had starved, notwithstanding the plenty God had given him. We see in commons, which remain so by compact, that it is the taking any part of what is common, and removing' it out of the state nature leaves it in, which begins the property; without which the common is of no use. And the taking of this or that part, does not depend on the express consent of all the commoners. Thus the grass my horse has bit; the turfs my servant has cut; and the ore I have digged in any place, where I have a right to them in common with others, become my property, without the assignation or consent of any body. The labour that was mine, removing them out of that common state they were in, hath fixed my property in them.

§ 31. It will perhaps be objected to this, that if gathering the acorns, or other fruits of the earth, &c. makes a right to them, then any one may ingress as much as he will. To which I answer, Not so. The same law of nature, that does by this means give us property, does also bound that property too. God has given us all things richly, 1 Tim. vi. 12. is the voice of reason confirmed by inspiration. But how far as he given it us? To enjoy. As much as any one can make use of to any advantage of life before it spoils, so much lie may by his labour fix a property in: whatever is beyond (his, is more than his share, and belongs to others. Nothing was made by God for man to spoil or destroy. And thus, considering the plenty of natural provisions there was a long time in the world, and the few spenders; and to how small a part of that provision the industry of one man could extend itself, and ingross it to the prejudice of others; especially keeping within the bounds, set by reason, of what might serve for his use; there could be then little room for quarrels or contentions about property so established.

§ 32. But the chief matter of property being now not the fruits of the earth, and the beasts that subsist on it, but the earth' itself; as that which takes in and carries with it all the rest; I think it is plain, that property in that too is acquired as the former. As much land as a man tills, plants, improves, cultivates, and can use the product of, so much is his property. He by his labour does, as it were, inclose it for the common. Nor will it invalidate his right, to say every body else has an equal title to it; and therefore he cannot appropriate, he cannot inclose, without the consent of all his fellow-counnoners, all mankind. God, when he gave the world in common to all mankind, commanded man also to labour, and the penury of his condition required it of him. God and his reason commanded him to subdue the earth, i.e.

improve it for the benefit of life, and therein lay out something upon it that was his own, his labour. He that in obedience to this command of God subdued, tilled and sowed any part of it, thereby annexed to it something that was his property, which another had no title to, nor could without injury take from him.

§. 34. God gave the world to men in common; but since he gave it them for their benefit, and the greatest conveniencies of life they were capable to draw from it, it cannot be supposed he meant it should always remain common and uncultivated. He gave it to the use of the industrious and rational, (and labour was to be his title to it;) not to the fancy or covetousness of the quarrelsome and contentious. He that had as good left for his improvement, as was already taken up, needed not complain, ought not to meddle with what was already improved by auother's labour: if he did, it is plain he desired the benefit of another's pains, which he had no right to, and not the ground which God had given him in common with others to labour on, and whereof there was as good left, as that already possessed, and more than he knew what to do with, or his industry could reach to.

2.4 Utilitarianism

Jeremy Bentham, an English philosopher of the nineteenth century, advanced a test for law on the basis of what he called, "utilitarianism". Bentham's principle of utilitarianism held that the "greatest happiness of the greatest number that is the measure of right and wrong". Under this test, he argued that private property can be justified on the grounds that it serves the function of maximising aggregate utility, or happiness, for the greatest number. He explored the role of private property in his *Theory of Legislation*.

■ ***Jeremy Bentham, The Theory of Legislation (1864)***
Pt 1, Ch 8

The better to understand the advantages of law, let us endeavour to form a clear idea of property. We shall see that there is no such thing as natural property, and that it is entirely the work of law.

Property is nothing but a basis of expectation; the expectation of deriving certain advantages from a thing which we are said to possess, in consequence of the relation in which we stand towards it. There is no image, no painting, no visible trait, which can express the relation that constitutes property. It is not material, it is metaphysical; it is a mere conception of the mind.

To have a thing in our hands, to keep it, to make it, to sell it, to work it up into something else; to use it none of these physical circumstances, nor all united, convey the idea of property. A piece of stuff which is actually in the Indies may belong to me, while the dress I wear may not. The aliment which is incorporated into my very body may belong to another, to whom I am bound to account for it.

The idea of property consists in an established expectation; in the persuasion of being able to draw such or such an advantage from the thing possessed, according to the nature of the case. Now this expectation, this persuasion, can only be the work of law. I cannot count upon the enjoyment of that which I regard as mine, except through the promise of the law which guarantees it to me. It is law alone which permits me to forget my natural weakness. It is only through the protection of law that I am able to inclose a field, and to give myself up to its cultivation with the sure though distant hope of harvest.

But it may be asked, What is it that serves as a basis to law, upon which to begin operations, when it adopts objects which, under the name of property, it promises to protect? Have not men, in the primitive state, a natural expectation of enjoying certain things, an expectation drawn from sources anterior to law?

Yes. There have been from the beginning, and there always will be, circumstances in which a man may secure himself, by his own means, in the enjoyment of certain things. But the catalogue of these cases is very limited. The savage who has killed a deer may hope to keep it for himself, so long as his cave is undiscovered; so long as he watches to defend it, and is stronger than his rivals; but that is all. How miserable and precarious is such a possession! If we suppose the least agreement among savages to respect the acquisitions of each other, we see the introduction of a principle to which no name can be given but that of law. A feeble and momentary expectation may result from time to time from circumstances purely physical; but a strong and permanent expectation can result only from law. That which, in the natural state, was an almost invisible thread, in the social state becomes a cable.

Property and law are born together, and die together. Before laws were made there was no property; take away laws, and property ceases.

As regards property, security consists in receiving no check, no shock, no derangement to the expectation founded on the laws, of enjoying such and such a portion of good. The legislator owes the greatest respect to this expectation which be has himself produced. When he does not contradict it, he does what is essential to the happiness of society; when he disturbs it, he always produces a proportionate sum of evil.

2.5 Aggregate economic wealth

Economic theories for the justification of private property abound. Among the more common economic justifications for private property is that advanced by Adam Smith. Like Karl Marx, Smith believed in the labour theory of value. That is to say, Smith argued that the source of a nation's wealth lay in the things that its labour could produce. He argued that the specialisation of labour, combined with self-interest, promoted the public interest. Smith is commonly recognised as promoting the theory of the "invisible hand" which says that people pursuing their own, individual self-interest unconsciously promotes the public interest. Protecting private property was a means of promoting that public interest. In Smith's view, protecting the fruits of a person's labour served to stabilise civil society because it would create incentives for work and the formation of capital, which would, in turn, promote the interests of society as a whole.

■ ***Adam Smith, The Wealth of Nations (1776)***
Bk 1, ch 2, §§ 1-2; Bk 4, ch 2, §§ 9, 51

This division of labour, from which so many advantages are derived, is not originally the effect of any human wisdom, which foresees and intends that general opulence to which it gives occasion. It is the necessary, though very slow and gradual, consequence of a certain propensity in human nature which has in view no such extensive utility; the propensity to truck, barter, and exchange one thing for another.

Whether this propensity be one of those original principles in human nature, of which no further account can be given; or whether, as seems more probable, it be the necessary consequence of the faculties of reason and speech, it belongs not to our present subject to enquire. It is common to all men, and to be found in no other race of animals, which seem to know neither this nor any other species of contracts.

[…] In almost every other race of animals each individual, when it is grown up to maturity, is entirely independent, and in its natural state has occasion for the assistance of no other living creature. But man has almost constant occasion for the help of his brethren, and it is in vain for him to expect it from their benevolence only. He will be more likely to prevail if he can interest their self-love in his favour, and show them that it is for their own advantage to do for him what he requires of them. Whoever offers to another a bargain of any kind, proposes to do this. Give me that which I want, and you shall have this which you want, is the meaning of every such offer; and it is in this manner that we obtain from one another the far greater part of those good offices which we stand in need of. It is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest. We address ourselves, not to their humanity but to their self-love, and never talk to them of our own necessities but of their advantages. […]

[T]he annual revenue of every society is always precisely equal to the exchangeable value of the whole annual produce of its industry, or rather is precisely the same thing with that exchangeable value. As every individual, therefore, endeavours as much as he can both to employ his capital in the support of domestic industry, and so to direct that industry that its produce may be of the greatest value; every individual necessarily labours to render the annual revenue of the society as great as he can. He generally, indeed, neither intends to promote the public interest, nor knows how much he is promoting it. By preferring the support of domestic to that of foreign industry, he intends only his own security; and by directing that industry in such a manner as its produce may be of the greatest value, he intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention. Nor is it always the worse for the society that it was no part of it. By pursuing his own interest he frequently promotes that of the society more effectually than when he really intends to promote it. I have never known much good done by those who affected to trade for the public good. It is an affectation, indeed, not very common among merchants, and very few words need be employed in dissuading them from it. […]

Every man, as long as he does not violate the laws of justice, is left perfectly free to pursue his own interest his own way, and to bring both his industry and capital into competition with those of any other man, or order of men. The sovereign is completely discharged from a duty [to manage the economy], in the attempting to perform which he must always be exposed to innumerable delusions, and for the proper performance of which no human wisdom or knowledge could ever be sufficient; the duty of superintending the industry of private people, and of directing it towards the employments most suitable to the interest of the society. According to the system of natural liberty, the sovereign has only three duties to attend to; three duties of great importance, indeed, but plain and intelligible to common understandings: first, the duty of protecting the society from violence and invasion of other independent societies; secondly, the duty of protecting, as far as possible, every member of the society from the injustice or oppression of every other member of it, or the duty of establishing an exact administration of justice; and, thirdly, the duty of erecting and maintaining certain public works and certain public institutions which it can never be for the interest of any individual, or small number of individuals, to erect and maintain; because the profit could never repay the expence to any individual or small number of individuals, though it may frequently do much more than repay it to a great society.

■ *Karl Marx & Friedrich Engels, The Communist Manifesto (1848)*
Chapter 1 (excerpts)

Of all the classes that stand face to face with the bourgeoisie today, the proletariat alone is a really revolutionary class. The other classes decay and finally disappear in the face of Modern Industry; the proletariat is its special and essential product.

The lower middle class, the small manufacturer, the shopkeeper, the artisan, the peasant, all these fight against the bourgeoisie, to save from extinction their existence as fractions of the middle class. They are therefore not revolutionary, but conservative. Nay more, they are reactionary, for they try to roll back the wheel of history. If by chance, they are revolutionary, they are only so in view of their impending transfer into the proletariat; they thus defend not their present, but their future interests, they desert their own standpoint to place themselves at that of the proletariat.

In the condition of the proletariat, those of old society at large are already virtually swamped. The proletarian is without property; his relation to his wife and children has no longer anything in common with the bourgeois family relations; modern industry labour, modern subjection to capital, the same in England as in France, in America as in Germany, has stripped him of every trace of national character. Law, morality, religion, are to him so many bourgeois prejudices, behind which lurk in ambush just as many bourgeois interests.

All the preceding classes that got the upper hand sought to fortify their already acquired status by subjecting society at large to their conditions of appropriation. The proletarians cannot become masters of the productive forces of society, except by abolishing their own previous mode of appropriation, and thereby also every other previous mode of appropriation. They have nothing of their own to secure and to fortify; their mission is to destroy all previous securities for, and insurances of, individual property […]

All previous historical movements were movements of minorities, or in the interest of minorities. The proletarian movement is the self-conscious, independent movement of the immense majority, in the interest of the immense majority. The proletariat, the lowest stratum of our present society, cannot stir, cannot raise itself up, without the whole superincumbent strata of official society being sprung into the air.

In proportion as the bourgeoisie, i.e., capital, is developed, in the same proportion is the proletariat, the modern working class, developed – a class of labourers, who live only so long as they find work, and who find work only so long as their labour increases capital. These labourers, who must sell themselves piecemeal, are a commodity, like every other article of commerce, and are consequently exposed to all the vicissitudes of competition, to all the fluctuations of the market.

Owing to the extensive use of machinery, and to the division of labour, the work of the proletarians has lost all individual character, and, consequently, all charm for the workman. He becomes an appendage of the machine, and it is only the most simple, most monotonous, and most easily acquired knack, that is required of him. Hence, the cost of production of a workman is restricted, almost entirely, to the means of subsistence that he requires for maintenance, and for the propagation of his race. But the price of a commodity, and therefore also of labour, is equal to its cost of production. In proportion, therefore, as the repulsiveness of the work increases, the wage decreases. Nay more, in proportion as the use of machinery and division of labour increases, in the same proportion the burden of toil also increases, whether by prolongation of the working hours, by the increase of the work exacted in a given time or by increased speed of machinery, etc. […]

Hitherto, every form of society has been based, as we have already seen, on the antagonism of oppressing and oppressed classes. But in order to oppress a class, certain conditions must be assured to it under which it can, at least, continue its slavish existence. The serf, in the period of serfdom, raised himself to membership in the commune, just as the petty bourgeois, under the yoke of the feudal absolutism, managed to develop into a bourgeois. The modern labourer, on the contrary, instead of rising with the process of industry, sinks deeper and deeper below the conditions of existence of his own class. He becomes a pauper, and pauperism develops more rapidly than population and wealth. And here it becomes evident, that the bourgeoisie is unfit any longer to be the ruling class in society, and to impose its conditions of existence

upon society as an over-riding law. It is unfit to rule because it is incompetent to assure an existence to its slave within his slavery, because it cannot help letting him sink into such a state, that it has to feed him, instead of being fed by him. Society can no longer live under this bourgeoisie, in other words, its existence is no longer compatible with society.

The essential conditions for the existence and for the sway of the bourgeois class is the formation and augmentation of capital; the condition for capital is wage-labour. Wage-labour rests exclusively on competition between the labourers. The advance of industry, whose involuntary promoter is the bourgeoisie, replaces the isolation of the labourers, due to competition, by the revolutionary combination, due to association. The development of Modern Industry, therefore, cuts from under its feet the very foundation on which the bourgeoisie produces and appropriates products. What the bourgeoisie therefore produces, above all, are its own grave-diggers. Its fall and the victory of the proletariat are equally inevitable.

3. The Right to Exclude

■ ***Sir William Blackstone, Commentaries on the Laws of England (1765)***
Bk 1, c 1, § 3.

The third absolute right, inherent in every Englishman, is that of property: which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land. […] So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. If a new road, for instance, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without consent of the owner of the land. In vain may it be urged, that the good of the individual ought to yield to that of the community; for it would be dangerous to allow any private man, or even any public tribunal, to be the judge of this common good, and to decide whether it be expedient or no. Besides, the public good is in nothing more essentially interested, than in the protection of every individual's private rights, as modelled by the municipal law.

3.1 The extent of the right

The U.S. Supreme Court has said that "the right to exclude others" is "one of the most essential sticks in the bundle of rights that are commonly characterized as property". [5] Yet, as Thomas W. Merrill, has said, it would appear that the right to exclude is more than just "one of the most essential" constituents of property – it is, in actuality, the *sine qua non*. "Give someone the right to exclude others from a valued resource, i.e., a resource that is scarce relative to the human demand for it, and you give them property. Deny someone the exclusion right and they do not have property."[6]

5. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 US 419, 435 (1982).
6. Thomas W. Merrill, *Property and the Right to Exclude*, 77 Neb L Rev 730 (1998)

On the face of it, the right to exclude may seem rather easy to enforce: If I own the property, I have the right to say who may, or may not, enter upon it. In reality, however, defining the precise extent of the right to exclude can be quite problematic. This is because the right is not absolute, but is, instead, subject to a variety of exceptions. Some of these exceptions apply in cases of necessity, or where there is some other overriding public purpose. Other exceptions apply where the owner of property is found to have opened it to the public or where the owner has permitted others to enter for specific purposes.

The right to exclude protects a number of important interests and human values. These include rights to privacy, autonomy, dignity, religious, and associational freedom. "The ability to control property is essential to the ability to create a home, a business, a religious center, or a school. The ability to exclude others is a key component of the legal rights necessary to create a life for oneself and to associate with others in common activities and enterprises. Is normally, but not always, accompanied by one's own right of access to the property. It may seem obvious, but it bears noting that we know where we are going to sleep each night because we know that we not only have access to our own property, but that, when we return home each night, no one will be there before us, claiming dibs on the bed. Stability created by property rights is established, to a very large extent, by the right to exclude."[7]

At the same time, however, rights to exclude are not absolute. In a number of cases, non-owners have a right to enter property possessed by others. For example, police officers have the right to enter upon private property when in "hot pursuit" of suspects. Ambulance drivers or fire brigades have the right to enter upon private property in order to save lives or other property. In some cases, public utilities may have the right to enter where necessary to maintain or install services such as water, electric, or sewer lines.

One of the most significant limitations on the right to exclude arises in the context of so-called public accommodations, such as hotels, restaurants, and shops. Numerous laws protect the right of individuals to enter establishments open to the public without being subject to invidious discrimination. In other words, public policy prohibits the owners of public accommodations from exercising their right to exclude based on race, religion, or sex.

3.2 Enforcing the right

3.2.1 Trespass

The right to exclude is generally enforced through the action in *trespass*. A trespass is "a physical intrusion upon the property of another without the proper permission from the person legally entitled to the possession of the property".[8] The interest protected by the law of trespass is the right of exclusive possession, or in other words, the right to exclude. The action in trespass may be maintained by anyone entitled to lawful possession, which may include the owner of the property, if it is in fact in possession, or a tenant or other person entitled to use the premises. In essence, we say that the law of trespass protects "possessors". In that regard, however, it is important to note that, in general, an owner of property may not be entitled to maintain an action in trespass, it he has leased the property to someone else. In that case, the tenant, rather than the landlord, would be the person entitled to bring an action trespass. After all, in the case of leased premises, it is the tenant, and not the owner, who is in possession of the premises, and who, therefore, has the right to exclude.

7. Joseph William Singer, *An Introduction to Property* 25 (2d ed. 2005)
8. *Hoery v. United States*, 64 P3d 214, 217 (Colo 2003).

(i) *Licence.* It is possible to defend against an action in trespass by showing *licence*, Canadian courts have defined a licence as follows: "A licence with respect to real property, is the authority to do an act with respect to the land which would otherwise constitute a trespass. A licence does not pass an interest in the property. Rather it is only *a personal privilege* with respect to the land. In deciding whether a licence has been created, the decisive factor is the parties' intentions. The question of whether the parties intended to create a licence is a question of fact. Where there is no formal document to evidence this intention, the precise circumstances and conduct of the parties must be examined to decide whether a licence was intended."[9] Licenses may be gratuitous or contractual. A gratuitous licence is created when I invite you to use my beach house for the weekend. The most obvious example of a contractual license is the purchase of a ticket to a hockey game, wherein the Montréal Canadiens have given a spectator a licence to enter the Bell Centre. In its simplest form, a licence is a defense to an action in trespass.

(ii) *Mistake.* The standard of care imposed on a non-owner is quite high. Any unprivileged entry on land will constitute a trespass, even where there was no intent to commit a wrong. To maintain an action in trespass, a land owner does not need to show that the defendant knowingly intended to commit a trespass. Instead, he need only show that the defendant entered upon his ground. It is irrelevant whether the defendant knew he was entering on someone else's property, and indeed, the defendant may have taken every precaution to ensure or that he was not entering upon someone else's land. The defendant may have believed that the land was his own. However, none of these facts will prevent him from being held liable in trespass.

The only defences to an action for trespass are accident or lack of volition. Here, the defendant would have to show that he did not intend to enter upon the land, but did so accidentally without negligence or recklessness on his part or that he was forcibly brought onto the land without his own intent.

Intent is, therefore, not an element of the action in trespass. That is to say, it does not matter whether one intended to commit a trespass; what matters is whether the defendant intended to enter upon the land. In this regard, the action in trespass is the closest the common law comes to the imposition of strict liability.

3.2.2 Ejectment

If a trespassor has physically occupied the premises, the lawful possessor may bring an action for *ejectment*. Ejectment is a special form of trespass action based upon a wrongful dispossession. "The plaintiff in such cases recovers not only the land itself, but also damages for the loss suffered by him during the period of his dispossession (mesne profits)."[10] The action for ejectment is generally used in situations where the owner or possessor has been dispossessed of property for a substantial period of time. The action for ejectment is frequently used to settle disputes over title to lands because it establishes the party with the superior rights of possession.

3.2.3 Criminal trespass

Trespass may also be a crime as well as a civil wrong. Unlike the common law action in trespass, most criminal statutes require that the defendant knowingly enter upon someone else's land. In other cases, statutes make it a crime for someone who was originally privileged to enter upon the land to refuse to leave after the original license granting access had been revoked or expired.

9. *Pollo v Taylor*, 2004 ABQB 173 (CanLII).
10. *Minaker v Minaker*, [1949] SCR 397, 401 (Rand J), quoting *Salmond's Law of Torts* 5th ed, p 208.